

**International Union of Operating Engineers, Local 150, AFL-CIO and Brandenburg Industrial Service Company, Inc. and Teamsters Union, Local 142, International Brotherhood of Teamsters, AFL-CIO.** Case 13-CD-547

March 27, 1998

**DECISION AND DETERMINATION OF  
DISPUTE**

MEMBERS FOX, HURTGEN, AND BRAME

The charge in this Section 10(k) proceeding was filed October 27, 1997, by the Employer, Brandenburg Industrial Service Company, Inc., alleging that the Respondent, International Union of Operating Engineers, Local 150, AFL-CIO (Operating Engineers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Teamsters Union, Local 142, International Brotherhood of Teamsters, AFL-CIO (Teamsters). The hearing was held December 19, 1997, before Hearing Officer Daniel E. Murphy.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

**I. JURISDICTION**

The Company, an Illinois corporation, is engaged in the business of demolition services, scrap, and recycling work from its facility located at the U.S. Steel, Gary Works refinery in Gary, Indiana. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers and Teamsters are labor organizations within the meaning of Section 2(5) of the Act.

**II. THE DISPUTE**

*A. Background and Facts of Dispute*

Gary Works is a steel mill consisting of blast furnaces, coke batteries, construction yards, and warehousing areas for material storage. Driving surfaces within the facility are hilly and rough, with gravel roads, muddy surfaces, and holes.

Scrap produced within the facility and purchased from outside the facility is delivered to a marshaling yard, where the material is dumped, sorted, and processed. After the scrap has been sorted and processed, it is loaded onto off-road hauling equipment and transported to one of two furnaces on the mill premises to be recycled.

Prior to 1996, over-the-road and off-the-road trucks used for hauling scrap to and within the facility had been driven by employees represented by Teamsters. In spring 1996, the Employer developed and engineered an off-road hauling vehicle designed to move material on rough surfaces with fewer loads of greater size. The Employer and Operating Engineers contend, and Teamsters does not seriously dispute, that because of the hauler's size and complexity, the hauler requires frequent, even daily, maintenance and repair.

Employees represented by Operating Engineers participated in the development and construction of the off-road hauler and operated the hauler during the re-engineering and testing phases of its development. They have operated the equipment exclusively since its incorporation into mill operations. Employees represented by Teamsters were not involved in the research, design, assembly, testing, or operation of the hauler.

Both Operating Engineers and Teamsters sought the assignment of the disputed work from the Employer while the hauler was still in development. From May until November, the Employer engaged in negotiations with the Unions to resolve the dispute. In August, Teamsters filed and continued to process grievances against the Employer related to the assignment of the work.<sup>1</sup> In October, Operating Engineers notified the Employer that it would strike and/or picket if it reassigned the disputed work to employees represented by Teamsters.

The parties' efforts to settle the dispute among themselves ultimately were unsuccessful. In November, the Employer assigned the disputed work to employees represented by Operating Engineers, citing as determinative factors in its decision the parties' bargaining agreements and industry practice. The Employer and Operating Engineers executed a memorandum of agreement incorporating the off-road hauler work into their current collective-bargaining agreement.

*B. Work in Dispute*

The disputed work, as stipulated by the parties, consists of:

[t]he operation of off-road haul equipment at Brandenburg Industrial Service Company's operation located at the U.S. Steel's Gary Works.

*C. Contentions of the Parties*

The Employer and Operating Engineers contend that the disputed work is properly assigned to employees represented by Operating Engineers based on: their collective-bargaining agreement and memorandum of agreement; area and industry practice; employee skills,

<sup>1</sup> Teamsters' internal grievance procedure is not binding on Operating Engineers.

training, safety; efficiency and economy; and Employer past practices and preference.

Teamsters claims the disputed work for employees it represents based on: its collective-bargaining agreement with the Employer; an alleged taint of the Employer's preference for assigning the work stemming from the conduct of Operating Engineers; Employer, area, and industry practice; relative skills of employees; and economy and efficiency of operations.

#### *D. Applicability of the Statute*

The parties have stipulated that there is reasonable cause to believe that the Operating Engineers violated Section 8(b)(4)(D) by threatening the Employer with a strike if the Company changed its assignment of the work from employees represented by Operating Engineers to employees represented by Teamsters.

The parties also have stipulated that there is no agreed-upon method for the voluntary adjustment of the dispute that is binding on all the parties.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

#### *E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

##### *1. Certifications and collective-bargaining agreements*

The parties stipulated that neither the Operating Engineers nor the Teamsters has been certified by the Board as the collective-bargaining representative of any of the employees performing the disputed work. Both Unions have collective-bargaining agreements with the Employer.

The Operating Engineers' master agreement entitles employees represented by it to operate, maintain, repair, move, dismantle, and assemble all machines listed in the classification section of the agreement, regardless of mode of power. Covered classifications include, inter alia, operators of backhoes, cranes and attachments, dozers, gradalls, highlifts, hydraulic backhoes, motor graders, scrapers, conveyors, bobcats and other

skid-steer machines, and forklifts, but do not expressly cover off-road haulers. Also included are mechanics and mechanic helpers. As noted above, the Employer and Operating Engineers ultimately executed a memorandum of agreement adding the classification of "off-road hauler" to their bargaining agreement.

The Teamsters' agreement entitles employees represented by it to perform heavy and highway construction and specified other work, including, inter alia, removal and disposal of rubbish from wrecking jobs, snow removal, hauling of specified materials and fill on construction jobs, delivery and spreading of construction site subsurfacing materials, back filling, digging, leveling and grading, and construction, slag and sludge hauling in or out of steel mills. It does not contain specific language that clearly obligates the Employer to assign operation of the off-road hauler to employees it represents. The parties modified the agreement in 1990 by a letter of understanding interpreting article 2 of their agreement, "Work Coverage." There, the parties clarified Teamsters' jurisdiction over the use of trucks to haul "material." It does not expressly address the hauling of materials by means other than by truck; and it does not purport to affect the meaning of the term "material," as contemplated by the bargaining agreement.<sup>2</sup>

Neither the Operating Engineers' nor the Teamsters' collective-bargaining agreement limits the Employer's ability to introduce new equipment. Both do require bargaining over wages and, in Operating Engineers' case, manning requirements.

The collective-bargaining agreement between the Employer and the Operating Engineers, as amended by the memorandum of agreement, expressly covers the disputed work. The Employer contends that it was privileged by the management-rights clause of its bargaining agreement with Operating Engineers to enter into the memorandum of agreement. Although Teamsters contests the assignment of the disputed work to the Operating Engineers' unit, no party disputes the contractual authority of the Employer and Operating

<sup>2</sup> Teamsters contends, and Operating Engineers disputes, that a 1969 agreement to settle jurisdictional disputes, entered into by joint councils of Teamsters and Operating Engineers, assigns hauling work in a scrap yard to employees represented by Teamsters. Teamsters and Operating Engineers introduced into evidence a number of documents, which they claim, respectively, show either that the agreement is still viable or that it is not. Based on the record before us, we cannot determine this issue; and we need not. We find that the settlement agreement does not have legal significance in the absence of clear proof of the status of the agreement. In any case, assuming, without deciding, that the 1969 agreement remains viable, it sheds no new light on the issue before us. That agreement and a subsequent addendum covers jurisdictional issues regarding trucks and other heavy equipment then in use on sites where the Unions were jointly employed. It has not been shown that work performed by the more recently developed off-road hauler was within the contemplation of the parties when they entered into that settlement agreement.

Engineers to amend their bargaining agreement. We find it unnecessary to decide the significance of the memorandum of agreement, however. It would not change our conclusion, *infra*, that as all other factors favor award of the disputed work to employees represented by Operating Engineers, the disputed work is properly assigned to employees represented by Operating Engineers. Accordingly, we find that this factor does not favor an award of the disputed work to the employees represented by either Union.

## 2. Employer preference

The Employer has assigned the disputed work to employees represented by Operating Engineers and prefers that those employees keep the assignment.

Teamsters contends that the Employer's preference was tainted by pressure and strike threats made by Operating Engineers and, thus, that its assignment of the work to employees represented by Operating Engineers was obtained by coercion. We find no merit to this contention.

As an initial matter, we find it significant that the Employer had expressed its preference that the work in dispute be performed by employees represented by Operating Engineers from the inception of its program to develop the off-road hauler early in 1996, through the production and testing phases of the project, and well in advance of Operating Engineers' October 1997 strike threat. From May until November 1996, the Employer engaged in protracted discussions with both Unions regarding the assignment of the disputed work and afforded each the opportunity to present any relevant evidence supporting its claim to the work. During that period of time, the hauler was operated exclusively by employees represented by Operating Engineers, without incident. Operating Engineers delivered its strike threat only after months of discussions failed to resolve the permanent assignment of the work.

It is the undisputed testimony of Company President Somerville that, following the parties' discussions, he analyzed the assignment issue in light of the information before him and, in November 1996, made the permanent assignment to employees represented by Operating Engineers based on specific objective considerations, discussed herein.<sup>3</sup> We do not find substantial evidence that Operating Engineers' threat of possible job actions influenced Somerville's decision, or more

broadly that it coerced this employer to make an assignment it would not otherwise have made.

Accordingly, we find that this factor favors the award of the disputed work to employees represented by Operating Engineers.

## 3. Employer and industry practice

Prior to the Employer's development and introduction of the off-road hauler in 1996, it had used employees represented by the Teamsters, driving conventional over-the-road trucks, for all hauling work on and off the Gary Works jobsite. However, when the Employer decided to develop the customized off-road hauler in spring 1996, it used employees represented by the Operating Engineers in the design, development, and construction of the hauler, and thereafter in the testing and re-engineering phases of its development.

Witnesses for the Employer and Operating Engineers testified that the off-road hauler is a completely new, customized vehicle. It has special operating requirements, different from other haulers and from any equipment heretofore used by the Employer. The hauler has a cab and controls in the front of the vehicle. In the rear, it has a bucket or box which is used to haul materials. It carries two to three times more material than the trucks the Employer had traditionally used. It features increased hydraulic capacity and a custom-mounted winch. The hauler exceeds in both size and weight vehicles that can be licensed for over-the-road use.

Teamsters asserts generally that the hauler is "an oversized truck" which, except for its size, does not substantially differ from other trucks used in hauling. It did not adduce specific evidence showing similarities between the hauler and conventional trucks. Further, it does not categorically dispute the Employer's description of the hauler, set forth above.

Consistent with its position that hauler operation was not covered by any existing bargaining agreement, the Employer assigned the disputed work to employees represented by the Operating Engineers on its incorporation into the routine mill operations at the Gary Works jobsite. Those employees exclusively have operated the equipment ever since then.

The Employer and Operating Engineers adduced extensive testimony and documentary evidence that the operation of off-road haulers by other contractors at the Gary Works site and, generally, within the steel mill industry in northwest Indiana, has been assigned to employees represented by Operating Engineers. Employer President Somerville testified that he investigated the area and industry practice concerning assignment of off-road haulers similar to its new hauler and found that they were assigned to employees represented by Operating Engineers. Operating Engineers

<sup>3</sup> Thus, this case is distinguishable from cases in which an employer's assignment of disputed work did not reflect the employer's free and unencumbered choice. See, e.g., *Teamsters 158 (Holt Cargo)*, 293 NLRB 217, 221 (1989), and *Bricklayers Local 1 of Missouri (St. Louis Home Insulators)*, 209 NLRB 1072, 1074-1075 (1974), in which the employers were coerced into assigning disputed work to employees to whom they had not traditionally assigned such work in order to avoid threatened work stoppages.

Business Representative Wayne Snider testified that, although the off-road haulers used at other local steel mills are not identical to the Employer's new hauler, they are similar in size and characteristics to the Employer's machine.

Teamsters did not present any evidence of off-road haulers being operated by employees it represents or any rebuttal evidence to that adduced by the Employer and Operating Engineers. Further, the evidence shows that Teamsters are still doing the same work they had performed prior to the introduction of the off-road hauler, except for the onsite scrap hauling now performed using the off-road haulers. There is no evidence that any employees represented by the Teamsters have lost their jobs as a result of the use of the haulers.

Based on the above considerations, we find that this factor favors the award of the disputed work to employees represented by Operating Engineers.

#### 4. Employee skills, training, and safety

Employees represented by Operating Engineers have been involved at every stage of the off-road hauler's development and operation. Accordingly, they have extensive experience with, and knowledge of, the vehicle's capabilities and uses. Teamsters have not had any responsibility for operating the haulers.

The Employer and Operating Engineers both presented testimony that the off-road hauler must operate on rough, uneven surfaces. Because of its size and design, particular skill is required to maneuver the hauler within the confined spaces of the jobsite and to position the vehicle for safe operation. Further, employees represented by Operating Engineers operate a variety of heavy equipment. Their familiarity with the operation of other heavy equipment is helpful in operating the hauler safely around other equipment operating in the same area.

Although employees represented by Teamsters have operated trucks to haul materials on the same terrain, there is no specific evidence that operating trucks on the mill premises is comparable to operating the hauler.

Operating Engineers has a training facility nearby in Plainfield, Illinois, where it trains workers in, among other things, the operation and maintenance of large off-road haulers similar to the one developed by the Employer. It has a system that allows employers to report any employee dispatched by the hiring hall who does not operate a piece of equipment competently. It has the right to refuse to dispatch from its hiring hall any employee about whom it receives complaints until the employee completes a retraining course.

Teamsters contends that its members have demonstrated their truck driving skills at the Employer's facility over a 15-year period. It did not adduce pro-

bative evidence concerning the ongoing training of employees it represents. Company President Somerville testified that employees represented by Teamsters could have been trained to drive the hauler. He also testified, however, that he did not believe that those employees could have been trained to maintain the hauler or to monitor the hydraulic system and the winch, as those functions have never been covered by the Teamsters bargaining agreement.

Based on the above considerations, we find that this factor favors the award of the disputed work to employees represented by Operating Engineers.

#### 5. Economy and efficiency of operations

Operating Engineers Business Agent C. Wayne Snider testified that the hauler is used in conjunction with other heavy equipment operated by employees it represents. Familiarity with other heavy equipment facilitates more efficient loading of the hauler. Further, the Employer's ability to obtain experienced heavy equipment operators from the Operating Engineers' hiring hall gives it greater flexibility in staffing its operations.

Employer President Somerville testified that overall efficiency of operations is enhanced by having employees represented by Operating Engineers who operate the hauler also perform repairs on it. Repair of heavy equipment is expressly covered under the Employer's bargaining agreement with Operating Engineers. Teamsters contends that the Employer should have assigned the disputed work to employees it represents and resolved issues regarding jurisdiction over preventive maintenance on the hauler through collective bargaining.

The Operating Engineers bargaining agreement permits the Employer to assign the operator of the off-road hauler to other equipment when the hauler is not in use, without limits on the number of equipment changes. The Employer's bargaining agreement with Teamsters permits no more than three changes in assignment in a day, excluding changes to buses, pool service trucks delivering materials to jobsites, breakdowns, and changes necessitated by the start of a new job.<sup>4</sup>

We find that this factor favors the award of the disputed work to employees represented by Operating Engineers.

<sup>4</sup> Teamsters contends that this provision permits more than three changes in assignment if they are to one of the excluded vehicles. Employer President Somerville testified that the Employer has no spare trucks available to assign to employees represented by Teamsters during times when the hauler would be idle and, accordingly, would have to send a Teamsters-represented employee home or pay him for time spent not working.

### Conclusions

After considering all the relevant factors, we conclude that employees represented by Operating Engineers are entitled to perform the work in dispute. We reach this conclusion relying on: Employer preference; Employer and industry practice; employee skills, training, and safety; and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by Operating Engineers, not to that Union or its members. The deter-

mination is limited to the controversy that gave rise to this proceeding.

### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Brandenburg Industrial Service Company, Inc. represented by International Union of Operating Engineers, Local 150, AFL-CIO, are entitled to operate the off-road haul equipment at Brandenburg Industrial Service Company's operation located at the U.S. Steel's Gary Works.